

**Unscrambling the Uncertainty:
Interpreting Egg Donor Agreements as They Relate to Embryo Adoption**

Mr. and Mrs. Peterson donated five frozen embryos to Mrs. Peterson's cousin, Mrs. Jones and her husband, Mr. Jones.¹ The Petersons had successfully undergone in vitro fertilization treatment, leaving them with five surplus embryos. Of the five frozen embryos, three were viable and a licensed fertility clinic implanted those three embryos in Mrs. Jones. The Petersons and the Jones exchanged no money for the surplus embryos, but the parties did execute a written document.

The five frozen embryos were created by anonymously donated eggs and Mr. Peterson's sperm. The Petersons signed an egg donor agreement three and a half years ago and while the Petersons have had no contact with the egg donor, they do have her health history. The egg donation facility that arranged the egg donation is no longer in business.

When Mrs. Jones was six months pregnant, Mrs. Peterson found a copy of the egg donor agreement she and her husband signed as the Intended Mother and the Intended Father; however, the Petersons never noticed the following language of the agreement:

"Egg donor understands that as of the date of the ova retrieval, Intended Mother and Intended Father shall be the owners of the ova and any resulting embryos as joint tenants with rights of survivorship. They shall have complete control and authority over the disposition of the ova and resulting embryos ...

Notwithstanding the foregoing, the Intended Parents shall not donate, sell or otherwise transfer any donated ova, pre-embryos, or embryos that result from the Procedure to another person or couple (other than a gestational surrogate working with the Intended Parents) for the purpose of conception."

¹ The fact pattern included herein is courtesy of the Embryo Donation and Adoption Campaign's 2008 Essay Competition conducted by NightlightTM Christian Adoptions. More information can be found at www.embryolaw.org.

This hypothetical situation raises issues and concerns rooted in the ever-changing field of assisted reproductive technology. This Comment focuses on the interpretation of egg donor agreements, specifically as they relate to subsequent embryo donation agreements.

Part I gives a brief history and broad overview of both egg and embryo donation. It describes the procedures used for egg donation, cryopreservation of the embryos, and the embryo transfer. Part II focuses on the egg donation agreement between the anonymous egg donor and the Petersons, specifically addressing the question of which law should apply to these types of arrangements - contract law or family law. It also considers the rights of the egg donor and the liabilities of the Petersons with respect to case law and legislation, as well as the American Bar Association's Model Act on Assisted Reproductive Technology. Part III focuses on the embryo donation agreement between the Petersons and the Joneses. It addresses the interpretation of the agreement by looking at legislation and case law. It also addresses the rights and liabilities of the parties to the embryo donation agreement.

I. A BRIEF HISTORY OF EGG DONATION AND EMBRYO DONATION²

A. *Egg Donation*

Egg donation often becomes necessary when a woman is unable, for medical reasons, to produce healthy eggs, but can carry a fetus to term.³ An egg donor's decision to donate her eggs is a serious undertaking, bringing both risks and rewards.⁴ The removal of the eggs is both

² Throughout this essay, the author will refer to the process of donating embryos as "embryo donation" and "embryo adoption" interchangeably. However, the semantical distinctions and resulting legal ramifications of these terms will be addressed herein.

³ See Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265 (1995).

⁴ The decision to be an egg recipient is not without its own share of potential complications, both physical and emotional. Parents who have used egg donors often struggle with telling their children the truth about their origins. See Patricia Wen, *To Tell the Truth: Many Parents Who*

physically invasive and time consuming.⁵ The egg donor must undergo several steps to complete the process including medical and genetic screening, blood tests, the administration of fertility drugs and hormone injections, and ultrasound-guided removal of the eggs.⁶ The egg donor faces several physical risks through this process such as ovarian cysts caused by stimulation of the ovaries, bleeding, injury, or infection as a result of the actual egg retrieval process.⁷

Egg donors fall into three major categories: women undergoing in vitro fertilization treatment where excess eggs are retrieved in the process, women undergoing tubal ligation or other abdominal surgery allowing access to eggs, and women who are recruited specifically for the purpose of egg donation.⁸ Egg donors may be motivated by a number of reasons.⁹ Some donate their eggs to help their own infertile relatives.¹⁰ Some say they consider it to be their personal mission to aid infertile couples.¹¹ Still others are motivated by the money.¹² While donors whose eggs are retrieved as part of in vitro fertilization are usually not paid, donors whose eggs are retrieved incidental to some other surgery and recruited egg donors are generally given some form of compensation. Recruited egg donors are typically compensated for their time and their transportation, which can add up to two weeks of daily visits to the clinic, plus a

Use Donor Eggs to Conceive Have Trouble Explaining It to Their Children, THE BOSTON GLOBE, February 4, 2008.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *The New Motherhood*, THE WASHINGTON POST, February 12, 1991.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Callie Weed
Stetson University College of Law, Gulfport, FL

day of egg retrieval.¹³ The egg donor also must sign an agreement, relinquishing all rights to the donated eggs and any children that may result from the donation.¹⁴

B. Embryo Donation

Excess embryos are a by-product of in vitro fertilization, one form of assisted reproductive technology. The purpose of in vitro fertilization is to produce an embryo that can be placed in the potential birth mother's reproductive organs.¹⁵ The first baby born as a result of in vitro fertilization was Louise Brown in England in 1978.¹⁶ In vitro fertilization involves the fertilization of an egg by sperm outside the womb in a petri dish.¹⁷ Because in vitro fertilization is expensive and many couples can only afford to do it once, doctors typically remove and fertilize as many eggs as possible to allow the couple the greatest chance for pregnancy.¹⁸ Before scientists discovered that cryopreservation of embryos was possible, fertilized embryos had to be implanted immediately or they would die.¹⁹ To increase the couple's chances for a successful pregnancy, a doctor would typically implant four or more embryos at a time.²⁰ This practice often led to the birth of multiples.²¹ Freezing the eggs prior to fertilization is not possible as immature eggs can be damaged by the freezing and thawing procedure.²²

¹³ *Id.*

¹⁴ BRETTE MCWHORTER SEMBER, *THE COMPLETE ADOPTION & FERTILITY GUIDE* 181 (2004).

¹⁵ Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 *BROOK. L. REV.* 853, 857 (2003).

¹⁶ Michelle L. Anderson, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 *CAP. U. L. REV.* 589, 596 (2006).

¹⁷ CHARLES P. KINDREGAN, JR. AND MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE* 327 (2006).

¹⁸ *Id.*

¹⁹ Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 *WIS. WOMEN'S L. J.* 179, 183 (2003).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 183-184.

Freezing embryos, however, proved to be a viable option for infertile couples. The embryos are frozen through a process called cryopreservation.²³ Cryopreservation is accomplished by packaging the embryo culture with cryoprotectants and inserting the package into a glass or plastic container for gradual freezing in liquid nitrogen.²⁴ This process allows the embryos to be frozen for future use and couples are able to avoid egg extraction and fertilization every time they want to attempt a pregnancy.²⁵ Since the introduction of cryopreservation, doctors typically fertilize about a dozen eggs in vitro and freeze the embryos that are not immediately implanted.²⁶

The frozen embryos can be stored indefinitely and there are currently hundreds of thousands of frozen embryos stored in fertility banks across the United States.²⁷ The question arises: What should be done with the surplus frozen embryos once the couple no longer wishes to use them to achieve pregnancy? The solutions vary. Some couples have chosen to donate their extra frozen embryos to science, some have elected to have their extra frozen embryos thawed (i.e. destroyed), and some have chosen to give their frozen embryos to an infertile couple through embryo donation.²⁸

Embryo donation is controversial topic, seemingly at every level.²⁹ Even its title has raised disputes. Some refer to this concept as “embryo donation”, while others have titled it “embryo adoption”. This may seem like a trivial distinction at first glance, but as the court in

²³ Johnson, *supra* note 15.

²⁴ *Id.*

²⁵ Charles P. Kindregan, Jr. and Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 171 (2004).

²⁶ *Id.*

²⁷ *Id.*

²⁸ KINDREGAN, *supra* note 17 at 106.

²⁹ Ever since embryos have been frozen, an informal practice of embryo donation has taken place – fertility clinics offered surplus embryos to infertile couples, sometimes without the consent of the progenitors. See Katz, *supra* note 19, at 185.

Callie Weed
Stetson University College of Law, Gulfport, FL

Davis v. Davis recognized, “semantical distinctions are significant in this context because language defines legal status and can limit legal rights.”³⁰ These semantical distinctions will come into play when addressing the enforceability of these types of agreements.

The concept of embryo adoption is unique to the United States, and has recently been gaining popularity.³¹ The process of embryo adoption differs slightly from an embryo donation, though both accomplish the same purpose – fertilized eggs in cryopreservation are given by the couple who created the embryos to another couple who can have the embryos implanted and hopefully give birth to a child.³²

Agencies specializing in embryo adoption often facilitate open embryo adoptions similar to open adoptions occurring post-birth. The donor couple and the potential recipient couple exchange letters, biographies and photos.³³ Both couples are able to detail what they are looking for in the other, then meet and choose the family that most appeals to them.³⁴ The process mirrors the traditional adoption process in that home studies are required, as well as investigations into any past child-abuse convictions.³⁵ Lawyers also may draft adoption agreements for the embryos.³⁶ These agreements provide for the relinquishment of parental rights of the genetic parents over the adopted embryos.³⁷ The agreement also provides that a

³⁰ *Davis v. Davis*, 842 S.W. 2d 588, 592 (Tenn. 1992).

³¹ Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children’s Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 19 (2003).

³² KINDREGAN, *supra* note 17 at 325.

³³ Alvaré, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Katz, *supra* note 19 at 192.

child born of the embryo adoption will have the surname of the adoptive parents, and will have inheritance rights solely through the adoptive family.³⁸

Fertility clinics frequently allow couples to donate their surplus embryos to other infertile women using the clinic's services, although this arrangement takes place without all of the procedures utilized by adoption agencies.³⁹ Fertility clinics typically require couples to address the ultimate disposition of their cryopreserved embryos from the outset of their treatment.⁴⁰ Their preferences as to the disposition of surplus embryos is put into contract form at that time, but the ultimate decision as to the embryos' disposition is often made by the couple or by a court when the issue is raised.⁴¹ If an embryo adoption takes place, the parties to the adoption usually remain anonymous.⁴²

Donated embryos are in high demand for older women whose eggs are no longer viable.⁴³ Embryos are also sought by couples who cannot afford in vitro fertilization or egg donation; lesbian couples who have been unable to conceive by way of donor insemination; and couples who do not have the means to adopt a child in the traditional sense.⁴⁴ Embryo adoption allows these couples the opportunity to become parents and allows couples with surplus frozen embryos to dispose of those embryos in a way that is both morally and ethically acceptable to them.⁴⁵

II. THE EGG DONATION AGREEMENT BETWEEN THE ANONYMOUS EGG DONOR AND THE PETERSONS

A. *How Should the Egg Donor Agreement Be Interpreted: Family Law or Contract Law?*

³⁸ *Id.*

³⁹ Anderson, *supra* note 16 at 601.

⁴⁰ KINDREGAN, *supra* note 17 at 105.

⁴¹ *Id.*

⁴² Johnson, *supra* note 15 at 863.

⁴³ Anderson, *supra* note 16 at 601.

⁴⁴ *Id.*

⁴⁵ Johnson, *supra* note 15 at 863.

The interpretation of egg donor agreements has most often been approached in one of two ways – the intent approach and the best interest approach. The intent approach follows contract law principles, while the best interest approach is rooted in family law concepts.

The intent or contract law approach is supported by a need for certainty concerning the enforceability of assisted reproduction agreements. As the court noted in *Kass v. Kass*, “Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process.”⁴⁶ Proponents of the intent approach argue that once commitments are made, they should be enforceable, just as in commercial transactions.⁴⁷ Additionally, the intent of the parties is of paramount importance because of the careful planning of these types of arrangements.⁴⁸ Enforcing the parties’ intentions allows people to plan their lives with some certainty.⁴⁹

A tension exists between the desire to ensure predicable outcomes for the parties and the recognition that the potential child’s interests deserve some level of protection.⁵⁰ Opponents of the intent approach argue that while contract law is appropriate in the commercial sphere, it may be unrealistic when dealing with the emotions and feelings related to parental status.⁵¹ Rather, opponents of the intent approach suggest that situations involving gamete donation should be governed by family law principles and the “best interest of the child” standard.⁵² Additionally, if

⁴⁶ *Kass v. Kass*, 696 N.E. 2d 174, 180 (N.Y. 1998).

⁴⁷ See generally Schiff, *supra* note 3.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 278.

⁵² Heather A. Crews, *Women Be Warned, Egg Donation Isn’t All It’s Cracked Up To Be: The Copulation of Science and the Courts Makes Multiple Mommies*, 7 N.C. J. L. & Tech. 141, 147 (2005).

the intent approach is followed, courts should be able to modify the agreement when it is in the best interest of the child.

While the applicability of contract law or family law principles is unclear, the decision of the *Litowitz* court may provide some direction in light of the hypothetical situation above.⁵³ The case before the *Litowitz* court involved a divorcing couple who had frozen embryos in storage.⁵⁴ The couple disagreed on the disposition of the frozen embryos, specifically which party should receive custody.⁵⁵ The couple had entered into an egg donor agreement at the time of their in vitro fertilization procedure, but the agreement failed to specifically state what would happen to the embryos in the case of divorce.⁵⁶

The Wife pointed out that the language of the egg donor contract provided:

“All eggs produced by the Egg Donor pursuant to this Agreement shall be deemed the property of the Intended Parents and as such, the Intended Parents shall have the sole right to determine the disposition of said egg(s). In no event may the Intended Parents allow any other party the use of said eggs without express *written* permission of the Egg Donor.”⁵⁷

The Wife argued that the Husband’s desire to donate the embryos to another couple violated the egg donor contract and could expose her to potential liability.⁵⁸ Additionally, when the egg donor learned of the dispute between the parties, she provided a declaration in which she stated, “In the event that the court fails to award the [pre-embryos] to [the Wife], I insist that the court award the [pre-embryos] to me or return the eggs to me in accordance with the contract.”⁵⁹

⁵³ See *Litowitz v. Litowitz*, 10 P. 3d 1086 (Wash. App. Div. 2, 2000).

⁵⁴ *Id.* at 1089.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1093.

⁵⁸ *Id.*

⁵⁹ *Id.*

The Court disagreed with the Wife's position, saying that the contract did not prevent the Husband from donating the embryos.⁶⁰ At most, the contract could require the Husband to obtain permission from the egg donor before the pre-embryo transfer occurred.⁶¹ However, the court found that such permission may not even be necessary given the language of the provision.⁶² The court stated, "The contract provision deals with ownership and disposition of the eggs. The eggs, however, no longer exist. They have been fertilized and are now pre-embryos. Thus, the donor's request that the eggs be returned to her, even if properly before the court, cannot be met."⁶³

Unlike the egg donor in *Litowitz*, the anonymous egg donor in the hypothetical facts above did not restrict the donor agreement only to the disposition of the eggs. Instead, the donor stated that "the Intended Parents shall not donate, sell or otherwise transfer any donated ova, pre-embryos, or embryos that result from the Procedure to another person or couple (other than a gestational surrogate working with the Intended Parents) for the purpose of conception." This raises questions as to the rights of the anonymous egg donor over the embryos that resulted from her donated eggs and were subsequently donated to the Joneses.

B. Rights of the Anonymous Egg Donor

1. Right to Not Procreate

Deeply ingrained in the laws of the United States is a right to privacy guaranteed to its citizens. The Fourteenth Amendment of the United States Constitution requires that no state

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

shall...deprive any person of life, liberty or property, without due process of law.⁶⁴ The United States Supreme Court explained in *Meyer v. Nebraska*:

Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁶⁵

The Supreme Court has gone on to say that if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁶⁶ The Supreme Court has also described the right to procreate as one of the basic civil rights of man.⁶⁷ This right to procreational autonomy has been confirmed by the Supreme Court in reproductive freedom cases.⁶⁸

The court in *Davis* recognized that the right of procreational autonomy is composed of two rights of equal significance – the right to procreate and the right to avoid procreation.⁶⁹ It is this second right that is at issue in the hypothetical situation above. Courts have held that, as a matter of public policy, they would not enforce an agreement that would compel one donor to become a parent against his or her will.⁷⁰ This is, in effect, the result of Mrs. Jones' pregnancy.

⁶⁴ U.S. CONST. art. XIV.

⁶⁵ *Meyer v. Nebraska*, 26 U.S. 390, 399 (1923).

⁶⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁶⁷ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁶⁸ See e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁹ *Davis*, 842 S.W. 2d at 601.

⁷⁰ *A.Z. v. B.Z.*, 725 N.E. 2d 1051, 1057 (Mass. 2000) (holding that as a matter of public policy, the court would not enforce an agreement that would compel one donor to become a parent against his or her will; *J.B. v. M.B.*, 783 A. 2d 707, 719 (N.J. 2001) (finding that a contract to procreate is contrary to public policy and is unenforceable).

The anonymous egg donor put forth her conditions of the egg donation in the egg donor agreement, which the Petersons subsequently violated. The child born of Mrs. Peterson will be the biological offspring of the anonymous egg donor. While courts have refused to force procreation on a person, they have not addressed the situation retroactively in the context of an egg donor agreement. Before addressing the liabilities of the Petersons as the result of their breach of the egg donor contract, we must determine whether the anonymous egg donor can continue to assert rights over the implanted embryos.

2. *Rights of the Anonymous Egg Donor Over the Implanted Embryos*

The *Litowitz* court refused to allow the egg donor to enjoy continued rights over her donated eggs once they had been fertilized.⁷¹ While the egg donor's agreement in *Litowitz* only provided her with rights over the donated eggs, the donor in the hypothetical situation above extended her control over the resulting pre-embryos and embryos resulting from her donated eggs.⁷² Despite the fact that this hypothetical egg donor is anonymous, we must consider her rights even in her absence, specifically addressing what would happen if she learned of Mrs. Jones' pregnancy and asked the court to enforce the egg donor agreement between her and the Petersons.

This author contends that public policy should restrict the ability of an egg donor to control the disposition of the embryos resulting from her egg donation.⁷³ As the *Litowitz* court

⁷¹ *Litowitz*, 10 P. 3d at 1093.

⁷² *Id.*

⁷³ For an alternative view, see Pam Belluck, *It's Not So Easy to Adopt An Embryo*, NEW YORK TIMES, June 12, 2005 (noting that women who donated eggs to help such couples make embryos in the first place often have mixed feelings about allowing them to be "redonated" to another couple. Susan L. Crockin, a Boston lawyer commented, "Most egg donors have no problem with donating excess embryos for research or discarding them, but I've seen a number of donors expressing reluctance to have embryos redonated to another family. What I hear is 'I'm doing this for this couple and I want to know where these embryos end up and what might happen.'")

pointed out, the donation of the anonymous egg donor, the donation of the eggs, no longer exists.⁷⁴ The eggs in the hypothetical situation above have been transformed into embryos, and have been implanted into the womb of Mrs. Jones.⁷⁵ Even if the anonymous egg donor claimed that the Petersons breached their egg donor agreement, the resulting remedies would be difficult to determine. The eggs could not be returned to the anonymous egg donor as the eggs by definition no longer exist.

Additionally, the resulting embryos are not solely the creation of the anonymous egg donor's contribution. They are the result of both the egg donation and the sperm donation of Mr. Peterson. Allowing the anonymous egg donor alone to control the destiny of the resulting embryos would effectively strip Mr. Peterson of his rights over the embryo which was also the result of his sperm donation.

Allowing continued control over the disposition of the embryos also flies in the face of the legal relinquishment of parental rights of the donor. When a woman donates her eggs, all of her legal rights over that egg and the potentially resulting child or children are terminated.⁷⁶ This termination of rights is critical to the donation process. Retaining legal rights over donated eggs and/or sperm can result in retained legal responsibilities. While anonymous sperm donors typically do not enter into contracts concerning their donation, they are generally protected by state laws which absolve them of parental rights and liabilities. Alternatively, most state statutes

⁷⁴ *Id.*

⁷⁵ *Cf. Moore v. Board of Regents*, 93 P. 2d 479 (Cal. 1990) (holding that a patient with a rare medical condition did not retain ownership rights in cells after they left his body and therefore could not bring a cause of action for conversion against the doctors at the medical center where he was treated who used the patient's cells in medical research).

⁷⁶ *See SEMBER, supra* note 14; *see also* the American Bar Association's Model Act on Assisted Reproductive Technology § 603 stating that "A donor is not a parent of a child conceived by means of assisted reproduction."

Callie Weed
Stetson University College of Law, Gulfport, FL

do not extend this protection to egg donors and thus a valid agreement must be reached.⁷⁷

However, the author is unaware of any court decisions to date which confer parental rights on an anonymous egg donor, thus reflecting the importance of the completion of the egg donation by a legal relinquishment of parental rights.

Retaining rights over the resulting child not only causes unintended liabilities for the egg donor, but also compromises the legal rights of the birth mother upon the child's birth. Allowing the egg donor to continue to control the destiny of the donated eggs raises serious public policy concerns. What happens when an egg donor writes into the contract that the resulting child must be raised Catholic, must attend an Ivy League school and must major in political science? Public policy demands that the donor's control over the donated eggs must be terminated once her eggs are fertilized. Contract law refuses to enforce contracts which are void as a matter of public policy.⁷⁸ Therefore, the language of the egg donor agreement in the hypothetical situation above dictating what the Petersons may or may not do once the egg is fertilized should be void as a matter of public policy.

C. The American Bar Association's Model Act on Assisted Reproductive Technology

In February 2008, the American Bar Association approved the Model Act Governing Assisted Reproductive Technology.⁷⁹ The purpose of the Model Act is to give assisted reproductive patients, participants, providers, and the resulting children and their siblings clear legal rights, obligations and protections.⁸⁰ The provisions of the Model Act support the public

⁷⁷ See Schiff, *supra* note 3.

⁷⁸ *Id.*

⁷⁹ The ABA Model Act on Assisted Reproductive Technology (herein after referred to as "ABA Model Act" or "Model Act") is accessible at: <http://www.abanet.org/family/reports/home.shtml>.

⁸⁰ ABA Model Act, Preparatory Note.

policy argument above, that an egg donor should not be able to control the disposition of her eggs, once they have been fertilized.

The Model Act sets forth certain donor limitations. One such limitation, found in § 204 (3) of the Model Act, states that a donor of gametes or embryos may condition donation on other reasonable use or disposition restrictions as set forth in a record prior to donation.⁸¹ The provision addressing the donation of unused embryos, § 502, states that intended parents may choose to donate their unused embryos subject only to any limitations set forth in a record prior to donation as permitted and imposed pursuant to the first provision.⁸² It is important to note that the first provision requires the conditions to be reasonable.⁸³

The Model Act points out that a donor is not a parent of a child conceived by means of assisted reproduction.⁸⁴ The egg donor relinquishes her rights upon the fertilization of the donated eggs. It follows that an egg donor agreement that controls the disposition of embryos after fertilization is not reasonable under the Model Act. The restrictions allowed by § 204 (3) are only applicable to the use or disposition off the donated eggs.⁸⁵ These restrictions cannot extend past the point of fertilization.⁸⁶ Allowing an egg donor to restrict the disposition of the resulting embryos violates both the Model Act and public policy.

D. Liabilities of the Petersons

The Petersons entered into an agreement with the Joneses that conflicted with the language of the egg donor agreement. While arguments made by this author above suggest that

⁸¹ *Id.* at § 204(3).

⁸² *Id.* at § 502.

⁸³ *Id.* at § 204(3).

⁸⁴ *Id.* at § 603.

⁸⁵ *Id.* at § 204(3).

⁸⁶ *Id.*

Callie Weed
Stetson University College of Law, Gulfport, FL

such language should be void as a matter of public policy, it will be presumed valid for purposes of determining potential liabilities of the Petersons.

1. Duty to Inform the Donor

The first question of liability is whether the Petersons have a responsibility to inform the egg donor of Mrs. Jones' pregnancy. In the hypothetical situation above, the donor is anonymous and has never had any type of contact with the Petersons. Additionally, the fertility clinic is no longer in business so it may be impossible to find the anonymous egg donor. The agreement between the anonymous egg donor and the Petersons likely does not give any clues to the identity of the egg donor as it is somewhat routine in anonymous arrangements for the parties to sign only their first names.

Even if the identity of the anonymous egg donor could be ascertained, contacting her and breaching the anonymity agreement would also seem to violate the original contract. Some would argue that she has a right to know that she will soon have biological offspring in the world. Others would argue that ignorance is bliss, and since the donor's parental rights have been effectively terminated, she has no right or reason to know of Mrs. Jones' pregnancy.

2. Damages

There is no question that the donation of the frozen embryos to the Joneses breached the language of the egg donor agreement. The question of damages remains. Payment of damages by the Petersons to the anonymous egg donor is impossible, simply by the donor's anonymity and the fact that the fertility clinic is no longer in business. Additionally, no legislation or case law has suggested that the breach of an egg donor agreement should result in payment of damages by the recipient couple.

There is, however, a question of liability on the part of the fertility clinic that thawed and implanted the surplus embryos. The ABA Model Act states that misuse of embryos shall subject a provider or assisted reproductive technology storage facility to criminal and civil penalties, including punitive damages and reasonable legal fees to the prevailing party.⁸⁷ In the hypothetical situation above, the egg donation agreement clearly specified that the resulting embryos were not to be re-donated to another couple. While there may be no affirmative duty for a fertility clinic to investigate whether any such agreement exists, prudent practice would demand such an inquiry. Because the fertility clinic failed to inquire into any previous agreements, and because their failure to do so resulted in their misuse of the embryos according to the previous agreement, the fertility clinic may be subject to liability.

III. EMBRYO DONATION AGREEMENT

A. *Interpretation of the Express Contract Between the Petersons and Joneses*

In the hypothetical situation above, the Petersons entered into an embryo donation agreement with Mrs. Peterson's cousin, Mrs. Jones and her husband. The Petersons, like many couples, had successfully undergone in vitro fertilization and had remaining eggs in storage. Embryo donation originally evolved as an alternative to a couple's previous options concerning the disposition of their surplus embryos – discarding the embryos, storing them indefinitely, or donating them to science.⁸⁸ Additionally, as one commentator noted, there are several practical advantages for the recipient of the donated embryos.⁸⁹ First, the process allows the receiving mother to control the prenatal environment for her child, which is often a concern in traditional

⁸⁷ ABA Model Act, § 1101.

⁸⁸ KINDREGAN, *supra* note 17 at 106.

⁸⁹ *Id.*

adoption arrangements.⁹⁰ Second, gestating donated embryos is far less expensive than a traditional cycle of in vitro fertilization and paying an egg donor if applicable.⁹¹ Despite the ever growing popularity of embryo donation, very few states have enacted statutes to guide the process.⁹²

Unlike traditional adoption, which has multiple procedural requirements, embryo donation is largely unregulated.⁹³ Some commentators warn that calling an embryo donation an “embryo adoption” may give the recipient parents a false sense of security regarding their parental rights and responsibilities since most states do not extend traditional adoption laws to the adoption of an embryo.⁹⁴ Additionally, both state laws and the Uniform Adoption Act consistently state that children cannot be adopted until after they are born.⁹⁵

1. Legislation

While “the legislature is the most appropriate forum to address issues raised by assistive reproductive technology in a comprehensive fashion”, most state statutes remain silent as to matters of embryo donation.⁹⁶ However, there are a few states that have stepped up to the plate and have enacted legislation to address this growing phenomenon.

In Florida, a donated embryo is presumed to be the child of the intended parents if both the donor couple and the intended parents consent to the donation in writing.⁹⁷ The statute

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² According to SEMBER, *supra* note 14, only California, Florida, Louisiana, North Dakota, Oklahoma and Texas have embryo donation laws.

⁹³ Anderson, *supra* note 16, at 594.

⁹⁴ KINDREGAN, *supra* note 17 at 109.

⁹⁵ *Id.* citing Uniform Adoption Act § 2-204, 9 U.L.A. 43 (1994). The exception to this rule is in Louisiana where embryos are considered judicial persons who may be adopted. LA. REV. STAT. ANN. § 9:130 (Acts 1986, No. 964 § 1).

⁹⁶ *Hodas v. Morin*, 814 N.E. 2d 320, 327 (Mass. 2004).

⁹⁷ FLA. STAT. ANN. § 742.11(2) (2004).

effectively requires the donor couple to relinquish their parental rights, but the statute does not specify how this is to be accomplished.⁹⁸

Oklahoma sets forth more specific requirements for “human embryo transfer and donation” as the statute is titled.⁹⁹ The statute requires that both the donor and intended parents must be married and the physician performing the transfer must obtain written consent from both the donor and intended parents.¹⁰⁰ This consent form must also be signed by the physician, as well as a judge of a court with adoption jurisdiction.¹⁰¹ The original consent form is then filed with the court by the physician.¹⁰² Any child resulting from the embryo donation is considered to be the child of the donee couple and the donor couple is relieved of all parental responsibilities.¹⁰³

The statute goes on to address concerns regarding trafficking in children.¹⁰⁴ It is this portion of the statute that would potentially disallow the donation of embryos from the Petersons to the Joneses. The statute states that “The transfer and donation of embryos pursuant to this section shall not be construed as trafficking in children if: 1) the human embryo is donated by the biological parents of the embryo.”¹⁰⁵ The language of the statute implies that only biological parents may donate an embryo, and any re-donation may considered to be child trafficking.¹⁰⁶

⁹⁸ *Id.*

⁹⁹ 10 OKLA. STAT. § 556 A. 1 (2004).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² It is interesting to note that the filed written consents are not open to the general public. Like traditionally “closed” adoptions, the information contained in the consent form may only be released to a person having a legitimate interest in the form, as evidenced by a specific court order. *See* 10 OKLA. STAT. § 556 A. 4 (2004).

¹⁰³ *Id.* at § 556 B. 1 (2004).

¹⁰⁴ *Id.* at § 556 E (2004).

¹⁰⁵ *Id.* at § 556 E. 3 (2004).

¹⁰⁶ *See* KINDREGAN, *supra* note 17 at 116.

The donor couple in the hypothetical situation above, the Petersons, were not the biological parents of the embryos. Only Mr. Peterson had a biological connection with the donated embryos. The statute does not directly address this particular situation, but rather seems to make an assumption that the “parents” either would or would not be the biological parents. It remains to be seen how an Oklahoma court would handle such a situation in light of the language of the statute.

This restriction on re-donation, however, seems to contradict the transfer of rights that occurs when that written consent form is filed with the court. The statute is ambiguous concerning exactly which rights are transferred when the consent form is filed. The statute refers only to parental responsibilities over any child or children resulting from the human transfer. The statute does not specify who has rights over the embryo prior to birth. It seems unlikely that the donor couple could claim rights over the embryo once it has been implanted in the intended mother, but the language of the statute is not clear as to the timing of the transfer of rights.

Additionally, the statute seems to ignore the previous termination of rights that would have occurred when the eggs were donated to an infertile couple. As discussed above, an egg donor no longer retains rights or control over her eggs once they have been fertilized. The intended parents, even if not the “biological” parents, have received all rights and responsibilities over the resulting embryos and, accordingly, should be able to donate any surplus embryos to another couple.

Louisiana has taken a unique approach, legislating that an in vitro fertilized ovum exists as a judicial person until such time as the in vitro fertilized ovum is implanted in the womb, or at any other time when rights attach to an unborn child in accordance with law.¹⁰⁷ As such judicial

¹⁰⁷ See generally LA. REV. STAT. ANN. §§ 9:121-135.

persons, embryos in Louisiana can be adopted in the traditional sense of the word. Genetic couples renounce their rights to their embryos, thereby making the embryos available for adoption.¹⁰⁸ The constructive fulfillment of Louisiana's adoption provisions occurs when the couple wishing to adopt the embryo executes a notarial act of adoption of the in vitro fertilized ovum and a birth occurs.¹⁰⁹ There is therefore no need for a post-birth adoption.¹¹⁰

Other state statutes insulate donors from retaining parental rights and responsibilities over their egg or sperm donation.¹¹¹ While these statutes do not reference embryo donors specifically, it can be argued that embryo donors would be afforded the same insulation and protection as egg or sperm donors. The statutes imply that embryo donors retain no rights or responsibilities concerning any children resulting from their donations.

2. *Case Law*

Because an embryo adoption has yet to be challenged, it is helpful to look at court cases which address questions concerning the enforceability of a contract that sets forth the disposition of embryos, as well as questions concerning the applicability of contract law or family law principles to such a contract.¹¹²

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See generally* COLO. REV. STAT. § 19-4-106(1)-(3) (2004); 13 DEL. CODE ANN. § 8-702 (2004); N.D. CENT. CODE § 14-18-04 (2003); TEX. FAM. CODE § 106.702 (2004); VA. CODE ANN. § 20-158A3 (2004); WASH. REV. CODE § 26.26.705 (2004); WYO. STAT. § 14-2-902 (2004).

¹¹² At least four cases have addressed the question of whether a contract addressing a pre-embryo disposition is enforceable: *Davis*, 842 S.W. 2d at 939-940 (noting that while the parties had no written agreement, such contracts should be enforced); *Kass*, 696 N.E. 2d at 180 (finding that the parties' express contract controls the disposition of the pre-embryos); *A.Z.*, 725 N.E. 2d at 1057 (holding that as a matter of public policy the court would not enforce an agreement that would compel one donor to become a parent against his or her will); and *J.B.*, 783 A. 2d at 619 (holding that a contract to procreate is contrary to New Jersey public policy and is unenforceable).

The court in *Davis* also concluded that pre-embryos are not, strictly speaking, either persons or property, but occupy an interim category that entitles them to special respect because of their potential for human life.¹¹³ The American Society for Reproductive Medicine has echoed this conclusion, stating that:

[T]he (embryo) deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The (embryo) is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biological potential.¹¹⁴

This conclusion seems to indicate that neither contract law nor family law can directly interpret embryo donation agreements. Contract law governs the transfer of property, while family law governs lives of persons in familial relationships. If embryos are neither property nor persons, but an interim category, it follows that a hybrid approach to the interpretation of egg donor agreements is proper. The current confusion between court decisions reveals that this hybrid approach is yet to be firmly established.

The court in *Davis* also held that an agreement regarding disposition of any untransferred pre-embryos should be presumed valid and should be enforced.¹¹⁵ If a pre-dispositional agreement is presumed to be valid and enforceable, it follows that a subsequent dispositional agreement should also be presumed to be valid and enforceable. Public policy supports the permanency and finality of adoption agreements.¹¹⁶ Children born as a result of embryo donation and their parents should be afforded the same sense of finality. Allowing an egg, sperm

¹¹³ *Davis*, 842 S.W. 2d at 597.

¹¹⁴ Johnson, *supra* note 15 at 870-871.

¹¹⁵ *Davis*, 842 S.W. 2d at 597.

¹¹⁶ *See generally* SEMBER, *supra* note 14 at 42.

or embryo donor to return days, weeks, or years after the child is born and assert rights over that child could have devastating effects for both the individual family involved and the entire practice of embryo donation.

Therefore, the embryo donation agreement between the Petersons and the Joneses should be presumed valid, transferring all parental rights and responsibilities over the embryos from the Petersons to the Joneses.

B. Rights & Liabilities of the Parties

In addition to the rights of the Joneses suggested above, Mrs. Jones has additional rights in her role as gestational carrier. At the time Mrs. Peterson found the egg donor agreement, Mrs. Jones was six months pregnant. The Supreme Court has noted that “the decision whether or not to beget or bear a child is at the very heart of...constitutionally protected choices.”¹¹⁷ It follows that Mrs. Jones has a constitutional right to continue her pregnancy to term. If a court found the embryo donation agreement between the Petersons and the Joneses was breached, forcing her to terminate her pregnancy as a result would violate her constitutionally protected right to procreate.

However, if the embryo donation agreement was found to be void, it would follow that by definition, Mrs. Jones would actually be acting as a gestational surrogate for the Petersons. Gestational surrogacy involves a woman who agrees to carry a child for intended parents conceived by the gametes of others, with a result that she gives birth to a child with whom she has no genetic connection.¹¹⁸ Mrs. Jones has no genetic tie to the child she has conceived and, if the embryo donation agreement were void, she would have no legal tie to the child either. If this

¹¹⁷ *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977).

¹¹⁸ KINDREGAN, *supra* note 17 at 132.

were the result, a post-birth adoption would quickly correct the voided embryo agreement, safeguarding and solidifying the interests of all involved parties.¹¹⁹

IV. *Conclusion*

As a matter of public policy, courts and legislatures should restrict the ability of an egg donor to control the disposition of the embryos resulting from her egg donation. Allowing egg donors such control undermines the integrity of the egg donor agreement and the process as a whole. The validity and completeness of the agreement would be compromised leaving the parties in limbo as to the extent of their individual rights over the donated eggs, resulting embryos and any children born of the arrangement. Accordingly, as in the hypothetical situation above, any language in an egg donor agreement controlling the subsequent disposition of resulting embryos should be void as a matter of public policy.

Parties to egg and embryo donation agreements need certainty concerning their contractual rights and obligations. The technology of this field has developed rapidly, and the legislatures have lagged behind. As one court has noted:

[W]e must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and--as now appears in the not-too-distant future, cloning and even gene splicing--courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored.¹²⁰

Legislatures must address this void and enact workable statutes to guide and protect donors, parents, providers, and the children born of assisted reproductive technology.

¹¹⁹ *Id.* at 134.

¹²⁰ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Cal. Dist. Ct. App. 1998).